STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 5, 1999
v	No. 204741 Oakland Circuit Court
EDWARD M. MATTHEWS, Defendant-Appellant.	LC No. 96-146105 FC

Before: Hood, P.J., and Holbrook, Jr., and Whitbeck, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of first-degree premeditated murder, MCL 750.316(1)(a); MSA 28.548(1)(a), armed robbery, MCL 750.529; MSA 28.797, and two counts of possession of a firearm during the commission of a felony (hereinafter felony-firearm), MCL 750.227b; MSA 28.424(2).[1] At the time of trial and sentencing, defendant was seventeen years old. He was sentenced as an adult to terms of imprisonment as follows: to life imprisonment without parole for the first-degree murder conviction, twenty to forty years for the armed robbery conviction, and two terms of two years for the felony-firearm convictions. We affirm.

I

At the time the offenses were committed, defendant was fifteen years old and a resident of a home for boys who were wards of the state. One or two days prior to the killing, defendant took from a van a handgun that apparently belonged to a group home counselor. On April 27, 1996, defendant and several other male residents left the home without permission. Defendant took the gun with him. While returning to the home in the early hours of April 28, 1996, defendant told the others that he planned to shoot a counselor, take the victim's money and car, and leave. When defendant and the other boys returned, Calvin Johnson, a supervisor at the home, began to search them for contraband.[2] When it came time for Johnson to search defendant, the boy pulled the gun and shot Johnson once in the chest and once in the back. Testimony adduced at trial indicated that the victim was shot in the back while he was crouched on the ground. After being shot, the victim crawled out of the home, collapsing on the pavement. Defendant then took Johnson's wallet as he lay on the ground.

II

While in police custody, defendant gave a written statement in which he acknowledged shooting Johnson, although he claimed he fired the gun accidentally. Prior to trial, defendant moved to suppress the statement, arguing that it was both the product of an invalid *Miranda*[3] waiver, and otherwise involuntarily made. At the conclusion of a *Walker*[4] hearing, the trial court ruled that both the waiver and the statement were voluntary.

Initially, we note that defendant's argument regarding the voluntariness of the statement is not limited in the manner suggested by his question presented. Rather than focusing on the alleged necessity of having a parent or guardian consent to a *Miranda* waiver and the subsequent making of a custodial statement, defendant appears to be arguing that the waiver and the statement were involuntary under the totality of the circumstances (the fact that a parent or guardian was not present being one of the circumstances to consider). To the extent that defendant's argument raises issues not mentioned in his question presented, we conclude that those issues have not been properly presented for appellate review. MCR 7.212(C)(5). Nevertheless, given the significance of those issues, and given that they were raised before and passed on by the trial court, we choose to review them.

A

Defendant argues that because his *Miranda* waiver was involuntary, the trial court erred in admitting the statement. We disagree. "Statements of an accused made during custodial interrogation are inadmissible unless the accused voluntarily, knowingly, and intelligently waives his Fifth Amendment rights. . . . [T]he voluntariness prong is determined solely by examining police conduct . . . ." *People v Howard*, 226 Mich App 528, 538; 575 NW2d 16 (1997). "Whether a waiver is deemed voluntary is determined by examining the totality of the circumstances surrounding the interrogation." *People v Sexton (On Remand)*, ___ Mich App ___; ___ NW2d ___ (Docket No. 177061, released July 13, 1999), slip op at 5. Plaintiff does not challenge the fact that defendant was in custody and undergoing interrogation when the *Miranda* waiver was made. Thus, the applicability of *Miranda* is not at issue. See *Oregon v Mathiason*, 429 US 492, 495; 97 S Ct 711; 50 L Ed 2d 714 (1977).

After reviewing the totality of the circumstances, we conclude that defendant's *Miranda* waiver was voluntary. *Sexton*, *supra* at 5; *Howard*, *supra* at 540. The record establishes that defendant was not coerced, deceived, or intimidated into signing the waiver form. There is no indication that he was deprived by the police of food or sleep. The interrogation itself only lasted approximately one hour. As for defendant's allegations of physical abuse, the trial court considered the testimony of the witnesses and concluded the charges to be without merit. We find nothing in the record to indicate such conclusion to be erroneous.

B

Defendant also argues that his statement was involuntary. Again, we disagree.

> The factors that must be considered in applying the totality of the circumstances test to determine the admissibility of a juvenile's confession include (1) whether the requirements of *Miranda* . . . have been met and the defendant clearly understands and waives those rights, (2) the degree of police compliance with MCL 764.27; MSA 28.886 and the juvenile court rules, (3) the presence of an adult parent, custodian, or guardian, (4) the juvenile defendant's personal background, (5) the accused's age, education, and intelligence level, (6) the extent of the defendant's prior experience with police, (7) the length of detention before the statement was made, (8) the repeated and prolonged nature of the questioning, and (9) whether the accused was injured, intoxicated, in ill health, physically abused or threatened with abuse, or deprived of food, sleep, or medical attention. [*People v Givans*, 227 Mich App 113, 121; 575 NW2d 84 (1997).]

The police handling of defense counsel is also a factor that should be considered. *Sexton, supra* at 6.

After reviewing the record, we believe the evidence supports the conclusion that defendant's custodial statement was voluntarily made. As we just concluded, defendant's *Miranda* waiver was voluntary. Further, the record shows that defendant's waiver was both knowing and intelligent. Each of defendant's *Miranda* rights were carefully read to him. Defendant indicated he understood each of his rights and decided to waive them and talk to the police. There is no evidence that defendant's age and intelligence level negatively impacted the voluntariness of the statement. Further, we find it significant that defendant was allowed the opportunity to summon his adult guardian. Instead of availing himself of this opportunity, defendant chose to misinform the police as to his guardian's identity. There was no error in admitting defendant's statement.

III

Next, defendant argues that his two felony-firearm convictions violate double jeopardy.[5] Defendant contends that he cannot be convicted twice for possessing a firearm during the commission of a felony, because the underlying offenses (murder and armed robbery) were committed within the course of the same criminal transaction involving a single victim. We disagree. As the Supreme Court observed in *People v Morton*, 423 Mich 650; 337 NW2d 798 (1985), the plain language of the felony-firearm statute clearly indicates that "with only a few narrow exceptions, . . . every felony committed by a person possessing a firearm results in a felony-firearm conviction." *Id.* at 656 (footnote omitted). Accordingly, defendant's argument is without merit.

IV

Defendant next argues that the prosecutor failed to present sufficient evidence to support his conviction of armed robbery. We disagree. When viewed in a light most favorable to the prosecution, we find the evidence to have been sufficient to support the conviction for armed robbery. *People v Kelly*, 231 Mich App 627, 641; 588 NW2d 480 (1998).

V

Defendant also argues that he was denied his right to an effective appeal because portions of the trial court's instructions to the jury were not transcribed due to a mechanical error of the recording device used in the lower court. MCR 7.210(B)(2) sets forth a procedure that allows an appellant to correct such an error. Here, any prejudice that has befallen defendant because of the incomplete nature of the transcript is due entirely to his failure to seek a certifying order pursuant to MCR 7.210(B)(2). Defendant acknowledges that the trial court issued a written copy of the instructions to the jury. Defendant had every opportunity to obtain certification of the written instructions as a substitute for the flawed transcript and failed to do so. Hence, there is no error.

VI

Next, defendant, who is African-American, argues that he was denied a fair and impartial trial when the prosecutor used a peremptory challenge to keep an African-American off the jury. Defendant argues that use of this challenge, and nothing more, proves the prosecutor selected jurors in a racially discriminatory manner. We disagree. "The mere fact that a party uses one or more peremptory challenges in an attempt to excuse minority members from the jury venire . . . is not enough to establish a prima facie showing of discrimination." *Clarke v Kmart Corp*, 220 Mich App 381, 383; 559 NW2d 377 (1996), citing *People v Williams*, 174 Mich App 132, 137; 435 NW2d 469 (1989). Moreover, the fact that the jury as seated contained one African-American is strong evidence that discrimination did not occur during the jury selection process. *Williams, supra* at 136. Defendant's argument therefore lacks merit.

VII

Finally, defendant raises a two prong challenge to his sentence. First, that the trial court erred by allowing the victim's relatives to speak at his sentencing hearing in a manner that denied him the right to counter the statements they made. We disagree. The two members of the deceased's family who spoke were entitled to do so. Const 1963, art 1, § 24; MCL 780.763(3)(d); MSA 28.1287(763)(3)(d); MCL 780.765; MSA 28.1287(765). Moreover, the trial court allowed defendant and his lawyer the opportunity to allocute at sentencing including the right to challenge statements made by the deceased's family.

Second, defendant argues that the trial court abused its discretion in sentencing him as an adult. Specifically, defendant asserts that he should be resentenced because: (1) the evidence displayed he was amenable to rehabilitation in the juvenile system; (2) that undue emphasis was given to the seriousness of his offenses; and (3) two witnesses who testified at the dispositional portion of the sentencing hearing did not adequately investigate his case. We disagree. "This Court reviews a trial court's findings of fact under a 'clearly erroneous' standard, while the trial court's ultimate decision to sentence defendant as an adult is reviewed for an abuse of discretion." *People v Dilling*, 222 Mich App 44, 52; 564 NW2d 56 (1997).

Here, the record clearly shows that the trial court considered all of the factors listed in MCR 6.931(E)(3)(a)-(f) at sentencing, that its findings of fact were not clearly erroneous, and that it did not abuse its discretion in deciding to sentence the defendant as an adult.

Affirmed.

/s/ Harold Hood
/s/ Donald E. Holbrook, Jr.
/s/ William C. Whitbeck

[1] The jury also convicted defendant of first-degree felony murder and one count of felony-firearm related to that conviction. However, those convictions were later vacated by the trial court.

[2] Apparently it was standard procedure to search residents who were absent without leave before allowing them to reenter the home.

[3] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

[4] *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

[5] US Const, Am V; Const 1963, art 1, § 15.